IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 409

AMERICAN SNUFF COMPANY, and MARTIN J. CONDON, Individually and as President of the AMERICAN SNUFF COMPANY, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

REPLY BRIEF FOR PETITIONERS

In reply to the recitals of the National Labor Relations Board in its brief in opposition to the petition of Petitioners herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit, Petitioners respectfully represent:

The question presented herein is not as stated by Respondent:

> "Whether a district court may require an employer, against whom an unfair labor practice complaint has been issued, to comply with a subpena calling for the production of records at a hearing before the Board, without permitting the merits of the complaint to be litigated in the subpena enforcement proceeding in the district court."

The question actually is:

> Whether a district court may require an employer against whom an unfair labor practice complaint has been issued, to comply with a subpoena calling for the production of records at a hearing before the Board, when the admitted facts and proffered records before the Court, are such as to reflect the legal conclusion that the material contained in the subpoenaed records cannot and does not touch upon matters under investigation, on which the Board, as a matter of law, has power to act or to issue affirmative orders.

Petitioners do not question the right of the Board to issue and to have obeyed, subpoenas requiring the production of evidence which touches upon matters under investigation involving issues over which the Board has power to act and upon which it has power to issue affirmative orders.

In the instant case, Petitioners have made no effort "to litigate the merits of their defense", as charged by Respondent. Petitioners have sought only to bring to the attention of the Court, in the form of admitted facts and proffers of pertinent records, existing and uncontroverted facts, sufficient to advise the court as to the basic facts of the controversy involved in order that they may suggest to the court, applicable principles of law which have been ignored by the Court below, but which remove the circumstances involved herein, from the area in which the National Labor Relations Board has power to act.

The opposition brief of Respondent makes no effort to meet Petitioner's major points that the admitted facts and proffered records, which are the basis of the complaint herein, all as reflected in the record, create a proposition of law which removes the subpoenaed records beyond the pale of materiality to any of the alleged issues involved herein.

To accept the premises and recitals set forth in Respondent's brief, is to underscore the proposition that no person subpoenaed for the production of records will be heard be-

fore the Courts on an order of enforcement brought under Section 11 of the Labor Management Relations Act, 1947, to present the facts underlying the question in issue, or to defend himself against being required to produce such records on the ground that the same do not touch and are not material to the matters under investigation or in question.

Such a position would fall squarely within the observation of the late Mr. Justice Murphy that, the employment of judicial power to enforce administrative orders, while denying to the courts judicial discretion; or, while denying them access to the facts, or the right to consider defenses, may well be termed, the "Rubber Stamp theory of justice." (*Penfield* v. *Securities Exchange Commission*, 330 U. S. 585). This Court has long since ruled out such a theory in another N.L.R.B. case. (*Myers, et al.* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49).

CONCLUSION

For the foregoing reasons together with those heretofore presented, it is respectfully submitted that there is no basis for the opposition to the petition as set forth in the brief of the National Labor Relations Board, and that the writ should issue as originally prayed.

Respectfully submitted,

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